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In the Supreme Court of the United States

OCTOBER TERM, 1965

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ACME INDUSTRIAL CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on October 6, 1965.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 13–18) is not yet officially reported. The Board's decision and order (J.A. 26–33)[1] are reported at 160 N.L.R.B. No. 144.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1965 (Appendix A, *infra*, p. 19). This

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[1] "J.A." refers to the joint appendix in the court below; copies have been filed with the petition.

Court has jurisdiction under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act (29 U.S.C. 160(e)).

QUESTION PRESENTED

Whether it is a refusal to bargain collectively, in violation of Section 8(a)(5) of the National Labor Relations Act, for an employer to decline to furnish the union with information relevant to a grievance until the need for the information has been determined in an arbitration proceeding.

STATUTE INVOLVED

The relevant statutory provisions are set forth in Appendix B, *infra*, pp. 21–22.

STATEMENT

The company (a manufacturer of tools and metal products) and the union[1] are parties to a collective bargaining agreement applicable to the employees at the company's Laflin Street plant in Chicago. The contract contains, among other provisions, a recognition clause, in which the company recognizes the union as the representative of all of the company's production and maintenance employees and certain other classes of employees (J.A. 95); a subcontracting clause, under which the company agrees "not to subcontract work which is normally performed by employees in the bargaining unit where this will result in the layoff of employees or prevent the recall of

[1] Amalgamated Local Union No. 310, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO.

employees who would normally perform this work for the Company" (J.A. 27, 96); and a work-transfer clause, which provides that if equipment of the plant or of any department is moved to another company location "employees working in the plant or in such department who are subject to reduction in classification or layoff as a result thereof may transfer to the new location with full rights and seniority" (J.A. 27, 102). It also contains a grievance procedure, grievance being defined in the contract as "a difference of opinion with respect to the meaning and application of the terms of this Agreement" (J.A. 90).

The grievance procedure consists of the following steps: (1) the employee, his steward, and his foreman first attempt to adjust the grievance; (2) if the matter is not satisfactorily settled, the steward then submits the grievance in writing, and the matter is discussed between the union's shop committee and representatives of the company's industrial relations department; (3) if there is still no satisfactory settlement, the union may "appeal" to the industrial relations department and may obtain the assistance of the union's international representative; (4) finally, the union may "appeal" the grievance to an arbitrator whose award "shall be final and binding upon the parties."[1] (J.A. 98–100.)

[1] However, the "arbitrator shall have no authority to change, alter, detract from or add to the provisions of this Agreement * * *, his authority being limited to the interpretation of the terms of this Agreement" (J.A. 100).

On or about January 8, 1964, the union discovered that machinery was being removed from the Laflin Street plant. It sought through its stewards information about the removal. The stewards asked foreman why the machinery was being removed and where it was being relocated. The foreman replied that there had been no violation of the contract and that the company, therefore, was not obliged to furnish this information (J.A. 27).[4] Between January 13 and March 3, 1964, the union filed 11 grievances relating to the removal of machinery and the subcontracting of work at the plant, charging that the company had violated the recognition, subcontracting, and work-transfer clauses of the contract (J.A. 27, 109–123).

On April 8, 1964, the president of the union wrote a letter to the company requesting information concerning the date on which each piece of equipment was moved out of the plant; the place to which the equipment was moved, and whether such place was a facility owned or controlled by the company; the number of machines or equipment moved; the reason or purpose for the move; and whether the equipment was used for production elsewhere. The letter as-

[4] For example, Rudolph Rich, the union's vice president and a steward, asked Foreman Steelhammer "if he would give me, as a union representative, the information that we were aware of the fact that machinery was being moved out of the plant which without this information forthcoming we were unable to continue—or even originate the filing of a grievance" (J.A. 64). Steelhammer, after checking with Industrial Relations Manager Bellush, advised Rich that "the Company felt that they were not in violation of the contract and, therefore, they did not feel compelled to give the union any definite answer as to why the machine was moved or where" (J.A. 65).

serted that this information was "essential to the Union for the servicing and administration of the current contract."[1] (J.A. 27–28, 124.) By letter of April 16, 1964, the company declined to furnish this information, on the grounds (among others) that the union had "available all the information [it needed] to determine whether or not any employees' rights are being violated" and that its questions were "indicative of a fishing and harassment expedition" (J.A. 28, 125–126). The union, alleging that the company's refusal to furnish the requested information constituted a refusal to bargain, collectively, in violation of Section 8(a)(5) of the National Labor Relations Act, filed unfair labor practice charges with the Board, and a complaint was issued (J.A. 2–8).

After a full evidentiary hearing, the Board found that "the information sought by the Union was necessary in order to enable the Union to evaluate intelligently the grievances filed and to determine whether such grievances were meritorious, and whether to press for arbitration" (J.A. 29). It further found "that the contract does not contain a clause dealing specifically with the furnishing of information necessary and relevant to the processing of grievances or any other clause by which the union waives its statutory right to such information" (*ibid.*). The Board concluded that in these circumstances the bargaining obligation imposed by Section 8(a)(5) of the Act required the company to furnish the information sought by the Union, and that by failing to do so the company had violated that obligation (*ibid.*). The Board ordered the company to provide the union, upon request, with

"information concerning the removal of equipment and machinery from its plant" (J.A. 30–31). The court of appeals, however, believing that the union's request for information should have been resolved under the contract grievance and arbitration procedure, denied enforcement of the Board's order (Appendix A, *infra*, pp. 13–18).

REASONS FOR GRANTING THE WRIT

Review by this Court is necessary to resolve a conflict among the circuits on a question of importance in the administration of the federal labor laws, decided erroneously below.

1. There can be no disputing the general proposition that a union designated to serve as the collective bargaining representative of the employees in a particular bargaining unit is entitled to such wage and related information in the employer's possession as the union may need in order to discharge its representation duties intelligently and effectively, and that an employer who refuses to supply such information to the union violates his obligation under Section 8(a)(5) of the National Labor Relations Act to "bargain collectively with the representatives of his employees."[*] The union cannot bargain effectively if

[*] *National Labor Relations Board* v. *Woolworth Co.*, 352 U.S. 938, reversing 235 F. 2d 319 (C.A. 9); *National Labor Relations Board* v. *Item Co.*, 220 F. 2d 956 (C.A. 5), certiorari denied, 350 U.S. 836; *J. I. Case Company* v. *National Labor Relations Board*, 253 F. 2d 149 (C.A. 7); *National Labor Relations Board* v. *Whitin Machine Works*, 217 F. 2d 593 (C.A. 4), certiorari denied, 349 U.S. 905; *Boston Herald-Traveler Corp.* v. *National Labor Relations Board*, 223 F. 2d 58 (C.A.1).

denied access to pertinent facts and data within management's possession. Nor is there any doubt that the union's representation duties in this case included the processing of grievances under the contract procedure,[6] and that the information sought was pertinent to determining whether the contract had been violated and whether the employees, therefore, were entitled to relief under the grievance procedure.[7]

Nevertheless, the court below held that a refusal to furnish information is not an unfair labor practice where the information sought relates to a matter which can be (and here was) presented as a grievance under the grievance and arbitration procedure contained in the collective bargaining agreement. The court reasoned that in such a case a Board proceeding undermines the private settlement machinery established by the agreement, and that the union should ask the arbitrator to compel the employer to furnish any needed information. The court's holding is in direct conflict with decisions of the Third and Sixth Circuits, which have held that, at least where, as in the present case, the refusal to furnish such information itself is not a grievance under the contract, the em-

[6] This is obvious on the face of the collective bargaining contract (see p. 3, *supra*).

[7] The information was sought with respect to possible violations of the recognition, subcontracting, and work-transfer clauses of the contract. There is no doubt that questions of compliance with those clauses would involve "a difference of opinion with respect to the meaning and application of the terms of this Agreement" (J.A. 98), and thus constitute "grievances." Indeed, the subcontracting clause specifically provided that violation thereof "will be subject to the grievance procedure" (J.A. 96).

ployer is required to furnish the information. *Timken Roller Bearing Co.* v. *National Labor Relations Board*, 325 F. 2d 746 (C.A. 6), certiorari denied, 376 U.S. 971; *Curtiss-Wright Corp.* v. *National Labor Relations Board*, 347 F. 2d 61, 71–72 (C.A. 3).[8]

2. The question is an important and recurrent one. The Board is constantly asked to decide whether Section 8(a)(5) of the Act requires the production of

[8] The Fifth and Ninth Circuits have held, seemingly in accord with the court below, that requests for information must be channeled through the grievance and arbitration procedure established by the contract. *Sinclair Refining Co.* v. *National Labor Relations Board*, 306 F. 2d 569 (C.A. 5); *Square D Co.* v. *National Labor Relations Board*, 332 F. 2d 360 (C.A. 9). These decisions, however, are distinguishable from the case at bar and from the Third and Sixth Circuit cases, for they turn on the principle—which the Board is challenging in a petition for certiorari to be filed shortly in *National Labor Relations Board* v. *C & C Plywood Corp.*, but which is not directly involved in the present case—that the Labor Board is without power to act on an unfair labor practice charge that turns on a question of contract interpretation. In *Sinclair* and *Square D*, the employer contended that the contract gave him unilateral control over the subject for which the information was sought (reductions in force for lack of work in *Sinclair* and a group-incentive plan in *Square D*), and the courts held that in these circumstances the question of relevance of the information—and hence whether the refusal to supply it was an unfair labor practice—turned on whether the contract in fact left the matter complained of to the employer's unilateral control. Since, in the courts' view, this raised a question of construction for the arbitrator to determine, it was appropriate that he also determine the relevance of the information. Here, on the other hand, there is no issue of contract construction which must be resolved in order to determine the relevance of the information sought to the union's duties, since the company made no claim that the matters complained of were within its unilateral control and thus not cognizable under the contract grievance and arbitration procedure (see n. 7, *supra*).

particular information sought by union or employer,* and innumerable collective bargaining agreements contain grievance procedures; all are potentially affected by the decision of the court of appeals in this case. Also involved here is the fundamental question of the extent to which the Board's remedial powers should be deemed abrogated or curtailed where the parties to a labor dispute have by contract created private machinery for the settlement of differences of opinion between them; another aspect of this important general question will be presented in the Board's petition for certiorari in *C & C Plywood Corp.* (see n. 8, *supra*).

3. The decision below is erroneous. The statutory "obligation to bargain in good faith includes the duty of the employer to furnish to the union relevant data to enable the representative effectually to bargain for the workers." *Sinclair Refining Co.* v. *National Labor Relations Board*, 306 F. 2d 569, 571 (C.A. 5). And, of course, the employer's good-faith bargaining obligation "does not terminate with the signing of the collective bargaining contract. It continues through the life of the agreements so far as it is necessary to enable the parties to administer the contract and resolve grievances or disputes." *Ibid.* See, *e.g.*, *Conley*

*In addition to the cases cited in note 5, *supra*, see *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149; *National Labor Relations Board* v. *Yawman & Erbe Mfg. Co.*, 187 F. 2d 947 (C.A. 2); *National Labor Relations Board* v. *Otis Elevator Co.*, 208 F. 2d 176 (C.A. 2); *Taylor Forge & Pipe Works* v. *National Labor Relations Board*, 234 F. 2d 227 (C.A. 7) certiorari denied, 352 U.S. 942; *National Labor Relations Board* v. *Leland Gifford Co.*, 200 F. 2d 620, 624 (C.A. 1); *Twenty-sixth Annual Report, National Labor Relations Board* (G.P.O., 1962), pp. 112–114.

v. *Gibson*, 355 U.S. 41, 46; *J. I. Case Company* v. *National Labor Relations Board*, 253 F. 2d 149 (C.A. 7). The information sought here was necessary to enable the union to present and resolve a grievance matter. By withholding such information, the employer hindered the union in the performance of its duty, as collective bargaining representative, to process grievances. As the Third Circuit pointed out in *Curtiss-Wright Corp.* v. *National Labor Relations Board*, 347 F. 2d 61, 71 (C.A. 3), "[d]emands for information are usual precursors to the submission of complaints and grievances to grievance and arbitration machinery. This is only natural, for * * * unions would be forced to grope blindly through the very stages of the grievance procedure unless adequate information were preliminarily available."

It is no answer that questions relating to information sought in connection with a grievance proceeding are for the arbitrator to decide. Not every grievance is carried to arbitration. Arbitration is usually the last as well as the most costly step in the grievance procedure. Many grievances are disposed of at earlier stages, either because investigation by the union shows them to be without merit or because the union for some other valid reason decides not to press them. Unless the union can obtain information in connection with a grievance before proceeding to arbitration, it will be unable to make an intelligent decision whether and how to process the grievance.

Thus the decision below, if upheld, would not facilitate or encourage the use of grievance and arbitration procedures to settle labor disputes, but would have the

opposite effect. If unions may be forced by employers to carry a grievance to arbitration before the union has had an adequate opportunity to determine such matters as whether the grievance has any merit, what provisions of the contract are relevant to its disposition, and whether it could not better be disposed of by informal methods, one of two results, both undesirable, will follow: Either all grievances will be pressed to arbitration, and grievance procedures, consequently, will become far more formal, cumbersome, protracted, and expensive than heretofore; or the union will be forced, because of the cost involved, to abandon many grievances which adequate information might have shown to be meritorious.

Since the decision below thus is incompatible with effective grievance procedures, the court of appeals' result can derive no support from this Court's decisions under Section 301 of the Labor-Management Relations Act giving hospitable scope to agreements to arbitrate.[10] Such decisions (which in any event do not purport to limit the Board's remedial authority under the National Labor Relations Act)[11] express a policy of encouraging the utilization of contract procedures for the resolution of labor disputes; the practical effect of the decision below would be to thwart the efficient functioning of such procedures.

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[10] *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574; *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593.

[11] See *Lodge 743, Machinists* v. *United Aircraft Corp.*, 337 F. 2d 5, 10–11 (C.A. 2), certiorari denied, 380 U.S. 908.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,
National Labor Relations Board.

JANUARY 1966.

APPENDIX A

In the United States Court of Appeals
for the Seventh Circuit

September Term, 1965 September Session, 1965

No. 15045

ACME INDUSTRIAL CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review and on Cross-Petition for Enforcement of an Order of the National Labor Relations Board

October 6, 1965

Before DUFFY, CASTLE, and MAJOR, *Circuit Judges*

CASTLE, *Circuit Judge:*

This case is before the Court upon the petition of Acme Industrial Company to review and set aside, and upon the cross-petition of the National Labor Relations Board to enforce, an order of the Board issued against the Company. The Board's decision and order are reported at 150 NLRB No. 144.

The Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by failing to comply with the

Union's[1] request for information regarding the removal of machinery from the Company's Chicago, Laflin Street, plant. The Board's order requires the Company to cease and desist from refusing to bargain with the Union by refusing to furnish it with information concerning the removal of equipment and machinery from the plant; or from in any like or related manner infringing on its employees' Section 7 rights. Affirmatively, the Company is required upon request, to furnish the Union information concerning the removal of equipment and machinery from its plant, and to post designated notices.

The Company and the Union were parties to a collective bargaining agreement which expired on June 30, 1962. In October 1962, the Company employees represented by the Union went out on a strike which terminated with execution of a new agreement in April 1963. Although the Company operates several plants, the new agreement applied solely to its Laflin Street plant in Chicago, Illinois. At the time of the strike, about 190 employees comprised the plant bargaining unit. Immediately after the Company resumed operations following the strike, a number of employes were laid off. Between April 1963 and the date of the unfair labor practice hearing in late August 1964, the number of employees on layoff status ranged between 30 and more than 75. During this period, the status of between 7 and 9 employees was changed from layoff to termination under provisions of the agreement that continuous layoff for given periods effected a loss of seniority.

The 1963 collective bargaining agreement included a no-strike clause, a grievance and arbitration clause embracing "a difference of opinion with respect to the meaning and application of the terms of this agreement", and subcontracting and work transfer clauses containing the following provisions:

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[1] Amalgamated Local Union No. 310, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO.

Article I

Section 3. It is the Company's general policy not to subcontract work which is normally performed by employees in the bargaining unit where this will cause the layoff of employees or prevent the recall of employees who would normally perform this work for the Company * * *

Article VI

Section 10. In the event the equipment of the plant or of any department, entirely or partially, is hereafter moved to another location of the Company, employees working in the plant or in such department who are subject to reduction in classification or layoff as a result thereof may transfer to the new location with full rights and seniority, unless there is then in existence at the new location a collective bargaining agreement covering production and maintenance employees at such location.

On or about January 8, 1964, the Union, upon discovering that machinery was being removed from the Laflin Street plant, began to seek information concerning this through inquiry by its stewards. The steward in each of the several instances involved asked why the machinery was being removed and where it was being moved. Company representatives answered that no violation of the contract was involved and refused to give the information. The Union submitted 11 grievances concerning removal of machinery and the subcontracting of work.

On April 3, 1964, the president of the Union wrote a letter to the Company requesting information concerning the approximate date when each piece of equipment was moved out of the plant; the place to which the equipment was moved and whether such place is a facility which is operated or controlled by the Company; the number of machines or equipment moved out of the plant; the reason or purpose for moving the equipment; and whether the equipment is

used for production elsewhere. The Company refused to furnish the information requested.

All of the 11 grievances were still pending at the time of the August 1964 hearing on the unfair labor practice charge. The Board found that the information requested was "necessary in order to enable the Union to evaluate intelligently the grievances filed and to determine whether such grievances were meritorious, and whether to press for arbitration". The Board reasoned that the denial of the information deprives the Union of an opportunity to know whether jobs and machinery had been moved out of the plant under circumstances entitling employees, especially those in layoff status, to follow the jobs or entitling the Union to grieve over improper subcontracting. The Board concluded that the Company was under a statutory duty to furnish the information for the reason that by virtue of the provisions of Section 8(a) (5) and (1) and 8(d) of the Act an employer is under a statutory duty to furnish his employees' bargaining representative information which is relevant to a grievance or to the administration or policing of the contract.

But, apart from provisions such as the subcontracting and work transfer clauses of the agreement here involved it is not apparent that the removal of machinery from an employer's plant would have relevance to a possible grievance or to contract administration or policing. The nature of the subject is such that it neither necessarily nor presumptively relates to wages, hours, or other terms or conditions of employment. Moreover, the agreement provided that differences with respect to the meaning or application of the provisions concerning the contracting out of work and work transfers are subject to final and binding compulsory arbitration. And the grievance procedures prerequisite to arbitration had been invoked and were pending. The factors bearing on a determination of the relevancy of the information requested are interrelated with a construction and application of the contract provisions. The latter is a matter exclusively reserved for the arbitrator. Under the

circumstances here presented Board intervention to make the determination of relevancy in the light of its independent interpretation of the meaning and application of the contract provisions contravenes the policy expressed in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, concerning the priority which should be accorded the grievance and arbitration procedures and machinery provided for in the contract. It was there pointed out (363 U.S. 581) that the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government and constitutes a part of the continuous collective bargaining process.

The arbitrator may require that he be furnished with information relevant to the resolution of the difference submitted. Under the rationale of *United Steelworkers, supra*, recourse to the Board under such circumstances as are here presented appears to constitute a refusal to participate in the continued collective bargaining process afforded by the grievance and arbitration procedures prescribed. In any event, enforcement of the Board's order in the posture of this case would in our judgment contravene the national policy embodied in Section 203(d) of the Labor-Management Relations Act (29 U.S.C.A. § 173) that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement". And, "[t]hat policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play". *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 566. Courts "have no business * * * determining whether there is particular language in the written instrument which will support the claim" (*ibid.*, 568). The declared statutory policy, and the judicial admonitions addressed to the courts, are equally applicable to the Board. Where the determination of the relevancy of information necessarily in-

volves factors interrelated with or dependent upon construction of the substantive provisions of the labor agreement, and those provisions are the bases of pending grievances already submitted under the grievance and arbitration procedures of the agreement, Board intervention in the guise of determining and enforcing the peripheral matter of the duty to furnish information requested contributes nothing to any objective of the Act and in our opinion is improper. The order clashes with the policy of effectual achievement of contractual arbitration.

The Board's order is set aside and its enforcement is denied.

ORDER SET ASIDE AND ENFORCEMENT DENIED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT

For the Seventh Circuit, Chicago, Illinois, 60604

WEDNESDAY, OCTOBER 6, 1965

Before

Hon. F. RYAN DUFFY, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*
Hon. J. EARL MAJOR, *Circuit Judge*

No. 15045

ACME INDUSTRIAL CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

This cause came on to be heard on the petition for review of an order of the National Labor Relations Board and the answer and request for enforcement of said order, and the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is hereby ordered by this Court that the order entered in this cause by the National Labor Relations Board on February 1, 1965, be, and the same is hereby set aside, and enforcement of said order is denied, in accordance with the opinion of this Court filed this day.

A true Copy:
Teste:

_____
Clerk of the United States Court of Appeals for the Seventh Circuit.

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APPENDIX B

The relevant provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

TITLE I. AMENDMENTS OF NATIONAL LABOR RELATIONS ACT

* * * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

SEC. 10. (a) The Board is empowered, as herinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

TITLE III. SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between

any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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